

PATRICK E. HAMMOND

IBLA 81-379

Decided November 27, 1981

Appeal from decision of the Oregon State Office, Bureau of Land Management, canceling cooperative agreements for wild free-roaming horses.

Reversed.

1. Wild Free-Roaming Horses and Burros Act

The Bureau of Land Management may not properly cancel cooperative agreements under the Act of Dec. 15, 1971, as amended, 16 U.S.C. § 1331 (Supp. II 1978), for wild free-roaming horses where there is no evidence that the horses under the agreements were inhumanely treated, only allegations that the assignee inhumanely treated another horse that was in his custody by virtue of a power of attorney under a separate cooperative agreement.

APPEARANCES: Gary J. Susak, Esq., La Grande, Oregon, for appellant; Eugene A. Briggs, Esq., Office of the Solicitor, Portland, Oregon, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Patrick E. Hammond has appealed from a decision of the Oregon State Office, Bureau of Land Management (BLM), dated January 13, 1981, canceling two cooperative agreements 1/ under which he was assigned four wild free-roaming horses pursuant to the Act of December 15, 1971,

1/ Appellant was originally assigned four horses under a cooperative agreement dated Dec. 18, 1979. However, one of the horses was subsequently returned and another horse substituted under a second cooperative agreement dated Jan. 14, 1980.

as amended, 16 U.S.C. § 1331 (Supp. II 1978). The rationale for the decision was "the reported treatment of a BLM wild horse (Freeze Mark No. 73-00054) assigned to Janet K. Hammond, but in [appellant's] custody, that resulted in the death of the horse on May 16, 1980." BLM concluded that the cancellation was necessary "to protect the government's interest in the welfare of the affected horses."

The cooperative agreements under which appellant was assigned the four horses provided for the "maintenance, protection and the welfare" of the horses. "Maintenance" is defined in the agreements as "proper care and protection of the animals under humane conditions for their lifetime." Furthermore, a cooperative agreement provides for termination of the agreement "by an Authorized Officer of the Bureau of Land Management after due notice in writing because of assignee's default or violation of any of the terms or provisions of this agreement."

The applicable regulations, 43 CFR 4740.4-2(d) and (e), similarly provide for "protection from inhumane treatment" and, furthermore, provide that an authorized officer "may take immediate possession" of a wild free-roaming horse when he determines that it is being inhumanely treated.

In the present case, appellant was notified by letter, dated October 31, 1980, that BLM wished to take possession of the four horses and requested appellant's cooperation in "arranging a date." Appellant's attorney, in responding to a conversation he had with the District Manager on October 31, 1980, suggested November 9, 1980, as a possible date and asked that a veterinarian be present to examine the horses (Letter to District Manager, Baker, Oregon, dated October 31, 1980). The horses were subsequently turned over to BLM personnel on November 21, 1980. At that time, they were inspected by a veterinarian, who concluded that "they appeared in sound condition" (Memorandum to the files from Chief, Division of Resource Management, Baker, Oregon, dated November 24, 1980).

The horse which was allegedly mistreated, mentioned in the BLM decision, was the subject of a separate cooperative agreement dated January 23, 1980, with Janet K. Hammond. It was identical in its language to appellant's agreements. There were a total of four horses under this agreement. The agreement was signed by appellant, on behalf of Janet K. Hammond, on the basis of a general power of attorney from her, dated January 14, 1980. Pursuant to the power of attorney, appellant took custody of the horses.

On May 16, 1980, one of Janet K. Hammond's horses which was in appellant's custody escaped from appellant's pasture. In the process of recapturing the horse, it died. Criminal charges were subsequently filed against appellant, pursuant to 16 U.S.C. § 1338(a)(3) (1976), for "knowingly and maliciously causing the death of a wild free-roaming horse." This resulted in a finding of not guilty by the U.S. Magistrate

in the case of United States v. Patrick Earl Hammond, No. CR 80-206 (Feb. 2, 1981). 2/

The cooperative agreement with Janet K. Hammond was not canceled. Rather, she was required to remove the three remaining horses under that agreement from appellant's custody (Letter from District Manager, Baker, Oregon, dated October 31, 1980).

In his statement of reasons for appeal, appellant argues that his cooperative agreements with BLM have been "fully performed," that the Government is collaterally estopped by virtue of the decision of the U.S. Magistrate as to the issue of mistreatment of the fifth horse or that, in the alternative, there is no substantial evidence of mistreatment or, at the very least, he is entitled to a hearing.

[1] The question is whether BLM properly canceled appellant's cooperative agreements for four horses on the basis of alleged mistreatment of a fifth horse in his custody. Under the facts of this case BLM's action was clearly improper. There is no evidence in the record that any of the four horses, specifically assigned to appellant, was ever inhumanely treated. The veterinarian who inspected the horses when they were turned over to BLM personnel indicated that the horses were in "sound condition." The record supports a finding that they were all well cared for. Furthermore, BLM did not seize the horses upon a determination of inhumane treatment, such seizure being allowable under 43 CFR 4740.4-2(e). Instead, BLM arranged for the orderly transfer of custody and canceled appellant's cooperative agreements. The seizure and cancellation were at the behest of the U.S. Attorney's Office. Any evidence of mistreatment was limited in this case to the horse which died on May 16, 1980. 3/

In the absence of any evidence of inhumane treatment of the horses under appellant's cooperative agreements, we cannot hold that

2/ There is evidence in the record that, during the pendency of the criminal proceedings, the individual in the U.S. Attorney's Office handling the case put "pressure" on BLM to take custody of the four subject horses indicating that if they were not seized his case "would be weakened" ("File notes" by the District Manager, Baker, Oregon, for Oct. 30, 1980). The District Manager expressed his reluctance to seize the horses "since evidence was limited to the subject dead horse." Id. That same attorney subsequently requested cancellation of appellant's cooperative agreements (Memorandum from District Manager, Baker, Oregon, to Chief, Division of Resource Management, Baker, Oregon, dated Jan. 2, 1981).

3/ In the "File notes" of the District Manager, Baker, Oregon, for Oct. 29, 1980, he stated that his information led him "to believe the subject horse was a rebel and Hammond got a one horse personality conflict. Other horses he had treated with good care."

the agreements were properly canceled pursuant to their stated terms, i.e., for violation of the provision regarding "proper care and protection of the animals" subject to the agreement. 4/ BLM should take appropriate action to return the four horses to appellant.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed.

Bruce R. Harris
Administrative Judge

I concur:

Douglas E. Henriques
Administrative Judge

4/ This decision should not be read as precluding the possibility of termination of a cooperative agreement when there is sufficient evidence of mistreatment of an animal or animals under another cooperative agreement. The record in this case does not support such a finding however.

ADMINISTRATIVE JUDGE LEWIS DISSENTING:

I disagree with the majority opinion for the reasons stated below.

BLM canceled the two agreements assigning four wild horses to Patrick E. Hammond because of the reported treatment of a palomino horse, freeze mark No. 73-00054, assigned to Janet K. Hammond, which treatment resulted in the death of the horse on May 16, 1980. ^{1/} The majority finds BLM should return to Patrick Hammond the four horses assigned to him on the theory that the horse which died was covered by an agreement with Janet Hammond. Apparently, therefore, according to the majority, BLM was powerless to pass on whether Patrick Hammond was inhumane to the horse which died because there was no evidence he was inhumane toward the four horses under his agreement with BLM.

Departmental counsel filed an answer to the statement of reasons, in which he sets forth the alleged facts involving the death of the horse involved in the present case. His statement is quoted below.

Patrick Earl Hammond acquired four wild horses by cooperative agreement for private maintenance, dated December 18, 1979. One of the horses was returned to BLM and a replacement animal was assigned to Mr. Hammond under an agreement dated January 14, 1980. Each agreement was on Form 4710-9 (March 1978), which was the standard BLM form for a cooperative agreement for the assignment for private maintenance of wild free-roaming horses or burros.

The agreements contain a recital that they are made in accordance with Public Law 92-195, Sec. 3(b), and that the animals are available for private maintenance in accordance with 43 CFR 4740.1 and 4740.2(b). * * *

* * * * *

Janet K. Hammond also was assignee of four wild horses for private maintenance. Patrick Hammond had actual custody of the horses.

On May 16, 1980, at about 4:30 to 5:00 p.m., three horses in Patrick Hammond's custody broke through his pasture fence during an attempt by him to herd them into his corral. One of these horses was a palomino gelding

^{1/} According to a letter from the District Manager, dated Oct. 31, 1980, BLM required Janet K. Hammond to remove the three remaining horses under her agreement from the custody of Patrick Hammond.

assigned to Janet K. Hammond and in the custody of Patrick Hammond. Mr. Hammond, with the assistance of other persons, attempted to recapture the horses. He chased them on foot and in a pickup truck. The horses eventually returned to the Hammond pasture, where two of them were corralled. The palomino continued to run in the pasture, chased by Mr. Hammond in his pickup truck. It broke through another fence and was chased through several other pastures before it finally was caught and roped. Tied to the back of the pickup truck, the horse fought and fell several times as it was pulled toward the Hammond pasture. The horse died during the journey home.

Mr. Hammond was charged with knowingly and maliciously causing the death of a wild free-roaming horse, in violation of 16 U.S.C. § 1338(a)(3), which provides that any person who maliciously causes the death or harassment of any wild free-roaming horse or burro shall be guilty of an offense against the United States.

Mr. Hammond was tried on the criminal charge before a magistrate in Pendleton, Oregon. He was acquitted. Enclosed is a copy of a letter written by the magistrate to Timothy E. Miller, representative of the United States Attorney, and Gary J. Susak, attorney for Mr. Hammond, in which the magistrate gives a statement of the facts and his reason for acquitting Mr. Hammond.

During the pendency of the criminal proceeding, Mr. Hammond was informed by letter dated October 31, 1980, from the District Manager that BLM wished to terminate the cooperative agreements. Mr. Hammond, represented by Mr. Susak, refused to agree to rescission of the agreements but did agree to surrender custody of the animals to the United States temporarily. Representatives of the Bureau of Land Management took custody of the horses on November 21, 1980, after Mr. Hammond delivered them to the Baker Livestock Yards. The United States continues to have custody of the horses, and the agreements were subsequently terminated as stated on page 1 of this memorandum.

Appellant basically contends that the horse killed itself and that he provided humane care.

It should be noted that the two agreements with Patrick E. Hammond were dated, respectively, December 18, 1979, and January 14, 1980. He returned a horse and substituted a second, resulting in the second agreement. The agreement with Janet K. Hammond was signed on

January 23, 1980. It covered four additional horses, including the one which died. At the time of that agreement Janet and Patrick were husband and wife, 2/ lived at the same address, and Patrick even signed her agreement under power of attorney. He seemed to have custody of the eight horses at all times until the two Hammonds has to give them up.

In taking over the horses for a year, appellant signed an agreement with BLM which provides:

1. Maintenance, as herein required, shall mean proper care and protection of the animals under humane conditions for their lifetime. None of these animals, or their remains, may be sold or used in any way for commercial exploitation, nor may any of these animals be transferred or reassigned except with written permission from an Authorized Officer of the Bureau of Land Management; however, if assignee desires to terminate this agreement, he must be responsible for finding a new home for the animals.

2. This agreement shall remain in full force and effect until (1) the animals die, (2) this agreement is terminated by an Authorized Officer of the Bureau of Land Management after due notice in writing because of assignee's default or violation of any of the terms or provisions of this agreement, or (3) upon request of the assignee.

3. Assignee assumes full liability for the animals included in this agreement and for any damages they may cause to persons, animals, or property.

4. Assignee must not brand animals included in this agreement.

5. Assignee must submit the following information to: Director, Bureau of Land Management (1)-300(A), Denver Federal Center, Building 50, Denver, Colorado 80225

(a) Notice of address change within 30 days.

(b) Notice of death or serious health problems; i.e., accidental injury or contagious disease.

2/ See page 1 of memorandum to files dated Nov. 6, 1980, from District Manager Baker, which reads: "We attempted to locate Ms. Hammond (Pat and Janet are now separated) * * *."

6. Assignee agrees to allow authorized BLM personnel or their representatives to inspect the animals at any time or place after assignment.

It is clear from the above-quoted agreement that appellant must give the wild horses he has taken humane treatment for the lives of the horses; also that BLM personnel or their representatives can inspect the horses at any time after their assignment to appellant.

The relevant provision of the statute, set forth at 16 U.S.C. § 1333(c) (Supp. II 1978) states:

(c) Where excess animals have been transferred to a qualified individual for adoption and private maintenance pursuant to this chapter and the Secretary determines that such individual has provided humane conditions, treatment and care for such animal or animals for a period of one year, the Secretary is authorized upon application by the transferee to grant title to not more than four animals to the transferee at the end of the one-year period.

The regulations at 43 CFR 4740.1 and 4740.2 relate to the capture and transportation of wild horses by the Government and not by individuals. In any case, such regulations do not sanction running a horse down with a pickup truck by the Government or by a private individual.

I would affirm the decision of BLM on either one or both of these two grounds:

(1) BLM has the duty under the law to ascertain that a prospective owner of a wild horse is humane. Under the theory of the majority a prospective owner could beat and starve to death every horse he owned except the specific ones covered by an assignment agreement with BLM, and BLM would be powerless to reject that owner. I do not believe the intent of the law was that it should be read so narrowly. On the facts as set forth by the Department -- and no one disputes that the horse was chased on foot, then chased by a pickup truck and then tied to the truck and pulled until it fell dead -- I think that Patrick Hammond has shown himself to have a vicious disregard for the welfare of a horse. First, if Patrick Hammon could not handle the horse after 5 months of caring for it under the agreement with BLM, he should have exchanged it for another one or returned it. Second, he used fatally bad judgment in chasing the horse to catch it. Horses cannot be caught by chasing. The more a horse is chased, the more frightened it becomes and the more panicky, and the more impossible it is to catch it. It also becomes breathless and may die from exhaustion. Desirable ways of catching the horse were to leave it alone until it calmed down; or to tie another

horse nearby, which the running horse would probably join because horses are herd animals and almost always stay in a group or together. On the record, I agree with BLM's judgment that Patrick Hammond is unqualified to have any wild horses assigned to him. In addition, as BLM personnel have face-to-face contact with the situation, the evaluation by BLM is, in my opinion, entitled to special weight.

(2) The assignment agreements as executed by Patrick and Janet Hammond were not really separate agreements. Patrick and Janet Hammond were husband and wife and lived under the same roof at the time of signing the contracts. Patrick even signed for Janet under power of attorney. Then Patrick apparently cared for all eight of the horses assigned to both of them. That is not an arm's length arrangement. Rather the agreements with the Hammonds so overlapped that they could, for practical purposes, be considered as agreements with Patrick and Janet jointly. Therefore, even applying the theory of the majority opinion, which I do not accept, I do not agree that Patrick's treatment of a horse under a contract with his wife exempts him from being found to be an inhumane owner of the four horses under the contracts he signed for himself.

Anne Poindexter Lewis
Administrative Judge

